IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 332 OF 2007

IN

SUIT NO. 2108 OF 1999

BANK OF BARODA, a body corporate Constitute under the provisions of the Banking Companies (Acquisition & transfer of Undertakings) Act, 1970 having its Head Office at Mandvi, Baroda and one of its Bori Bunder Branch Sohrab Mansion, 1st Floor, 35, Murzban Road, Bori Bunder, Mumbai - 400 001.	Plaintiff
Vs.	
1. DEEPAK RAGHUVIR WAGLE Proprietor of M/s JYOTI ELECTRONICS Mumbai,Inhabitant residing at A/1-5 Samruddhi, Baburao Parulkar Marg, Dadar (West), Mumbai - 400 028 and carrying on business at 86/C, Mittal Court, Nariman Point, Mumbai - 400 021, and also carrying on business at Shop situated at Surekha Bhavan, Rajendra Prasad Road, Dombivali (East), Dist. Thane 2. MRS. JYOTI DEEPAK WAGLE Mumbai,Inhabitant residing at A/1-5 Samruddhi, Baburao Parulkar Marg, Dadar (West), Mumbai- 400 028	Defendants

Mr. S.M. Sidhwa for Plaintiff.

CORAM : SHRI. A.M. KHANWILKAR, J.
DATE : 3RD APRIL, 2007

JUDGMENT

1) Opposite party has been duly served. However, none appears for the defendants when the

matter is called out.

2) By this motion, plaintiff prays that the order passed by the Prothonotary and Senior Master on 11th December 2006, dismissing the suit for default be set aside and the suit be restored to the file. The impugned order passed by the Prothonotary and Senior Master reads thus :

> "The plaintiffs and their Advocates are absent. They were absent on the earlier occasions also. It is not known whether the Defendants have been served or not. Suit dismissed for default."

2) The question is : whether the Prothonotary and Senior Master has power to dismiss the suit for default. In my opinion, the answer should be in the negative. Perhaps the only provision to which such power can be traced is Rule 986. Rule 986 reads thus :

> "986.- Every plaint, memo of appeal, application for execution and all other applications and petitions of original nature including the petition by an indigent person, in which, the Plaintiff/ Appellant/ Applicant/Petitioner does not remove the office objections within 30 days from the date of lodging the said documents, shall be placed before the Prothonotary and Senior Master for directions, who may reject such documents

> for non-removal of office objections. Rule 133 of these Rules will apply to such rejection."

3) On the plain language of this Rule, it is obvious that the plaint can be rejected for non removal of office objections and not for default of Advocates or parties to appear before the Prothonotary and Senior Master when the plaint is placed under caption ‘direction’.

4) Presumably, the Prothonotary and Senior Master was of the view that due to non filing of Affidavit, the position whether the defendants have been served was not clear, treating the same as Office objection. However, on reading of the order as a whole, the only reason that can be discerned is that the suit has been dismissed for default and not for non removal of office objection as such. In any case, the matter was listed on the given date under caption ‘direction’ before the Prothonotary and Senior Master and not for dismissal due to non removal of office objection. Thus the said order passed by the Prothonotary and Senior Master dated 11th December 2006, cannot be allowed to stand. The same is set aside.

5) Accordingly, Motion is made absolute in

terms of prayer clause ‘A’. It is however ordered that the plaintiff shall file Affidavit of service to establish that defendants have been duly served with the Writ of Summons within two weeks from today, failing which the suit shall be dismissed for non prosecution without further reference to the Court.

6) Needless to mention that the Office will place this order before the Prothonotary and Senior Master for future guidance.

(A.M. KHANWILKAR, J.)